



Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of

Petition of National Association of Broadcasters) MB Docket No. 04-160
Regarding Programming Carried By)
Satellite Digital Audio Radio Service (SDARS))

To: The Media Bureau

REQUEST TO HOLD IN ABEYANCE AND CONTINGENT COMMENTS

SUBMITTED BY
COMMON CAUSE
NATIONAL FEDERATION OF COMMUNITY BROADCASTERS
OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, INC
THE CENTER FOR DIGITAL DEMOCRACY,
FREE PRESS
AND
THE NEW AMERICA FOUNDATION

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The above-named Commenters request that the Commission hold in abeyance any action on the National Association of Broadcasters' April 14, 2004 *Petition for Declaratory Ruling* ("Petition") pending completion of the work of the Commission's Localism Task Force.

Absent adoption of clear policies with respect to commercial terrestrial broadcasters' obligations for the twenty-first century, the Commission cannot rationally consider the issues presented in the *Petition*. Thus, if the Commission should determine to act upon the *Petition* before the Localism Task Force has submitted its final reports, Commenters must, alternatively, ask that the *Petition* be denied.

The central premise of the NAB's demand for special protection from its competitors is that local terrestrial broadcasters meet the needs of local communities. The Commission cannot even begin to address the merits of the *Petition* until it determines whether this underlying assumption

remains true.

The Commission's promised *Notice of Inquiry* on localism is now ten months overdue. The *Notice* and the other work products of the Localism Task Force will address important questions about local service and locally originated programming which are essential to addressing issues which the NAB has presented. Among the unresolved issues of fact is whether local commercial radio has been transformed into a *de facto* national service. To answer that question, the Commission must consider, among other things, practices such as "voice tracking" and other technologies that disguise imported content as local, the impact of news gathering conducted from distant locations, the "outsourcing" of local news and the centralization of programming decisions on matters such as playlists and formats.

If the Commission does not hold the *Petition* in abeyance, the Commission should declare that SDARS licensees should be authorized provide localized content. It is difficult to imagine how it serves the public interest to foreclose additional, albeit limited, opportunities for locally oriented content when terrestrial radio is increasingly failing to provide such service. If it is in the public interest for terrestrial radio licensees without local bureaus in the city of license to outsource news and public affairs programming, or to provide "local" news, traffic, weather, "amber alerts," and emergency information from remote locations, it is arguably no less in the public interest for this service to be provided by SDARS licensees.

The Commission should also consider the extent to which SDARS licensees should have explicit public interest obligations in exchange for access to local markets over public spectrum. At the least, the Commission should require SDARS licensees to document regularly how they are fulfilling the promises they made in 1995 to serve niche audiences, and how they fulfill the general

duty of all licensees to serve the public's paramount First Amendment right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969).

If the Commission should wish to prohibit SDARS licensees from offering localized content, it can do so if, and only if, it takes affirmative steps to assure that terrestrial commercial stations are offering adequate locally-directed, locally-originated programming to meet the needs of each community. To permit commercial terrestrial broadcasters to offer what increasingly amounts to a national or regional service instead of a local service, while denying their local communities a competitor willing to offer local content, would be to place the Commission's imprimatur on hypocrisy of the highest order.

SUMMARY

The NAB asks the Commission to declare that the SDARS rules prohibit offering localized content, particularly local traffic and weather. The NAB argues that permitting SDARS licensees to offer such services will draw listeners away from local terrestrial broadcasters, further eroding the already precarious financial state of local terrestrial broadcasters.

The NAB justifies shielding local terrestrial broadcasters from purely economic competition on the grounds that free over-the-air radio provides "vibrant local broadcasting." *Petition*, p. 16. It quotes from its own 1995 study to claim that

[s]tations licensed to these [s]mall markets play a vital role in the life of the communities they serve, providing an important forum for discussion of significant issues of public importance, a productive catalyst for organization of community affairs, local charity and social action, and an effective vehicle for dissemination of many different types of information of interest to diverse groups within the local community.

Petition, p. 8. It maintains that allowing SDARS to offer local content will draw listeners from local radio stations and thus threaten their continued financial viability.

The NAB is surely correct that Congress and the Supreme Court have recognized that preserving a system of free over the air broadcasting that covers matters of interest to local communities, fosters debate on local issues, and provides access to diverse and stimulating entertainment is essential to sustaining a healthy democracy. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1997). Furthermore, it is quite true that local broadcasters can play a vital role in providing real time information to listeners in times of crisis.

But it is at best unclear that commercial radio service *of today* resembles the free over the air service Congress contemplated, or that the FCC is committed to protect. Commenters dispute the claim that local terrestrial commercial broadcasters fulfill their obligations to their local communities in a way that justifies economic protectionism. To the contrary, a large and increasing proportion of local radio stations appear to have abandoned their commitment to true locally oriented broadcasting.

The dominance in commercial radio of large consolidated corporations more interested in cross-leveraging their local radio “assets” rather than in offering genuine local service has led to terrestrial radio increasingly resembling a national, rather than local, service. With increasing frequency, these large group owners use “voice tracking” to create national programming with minimal local content – typically just traffic and weather – inserted by the local licensee. Rather than creating vibrant debate by producing differentiated local news and public affairs programming, more and more licensees. Distant news bureaus are producing newscasts allegedly covering local news. Syndicated programming, often owned by the same group owners, increasingly displaces local program-

ming that would foster discussion of local issues. National playlists – where placement is either a cross-promotion of an album releases or concert tour owned by the group owner or sold as part of a national ad buy ‘package’ – have all but eliminated air time for local musicians or for musicians that lack the backing of a major record label.

The evidence that broadcasters routinely fail to serve their local communities has become so widespread that the Commission has created a task force expressly to investigate the current state of localism, and to make recommendations to the Commission on how to address the failure of broadcasters to offer genuine local service. The Commission has also promised to issue a *Notice of Inquiry* to address concerns about localism.

The Commission should not act before the Task Force completes its report and makes its recommendations. Most importantly, the Commission should not act before it has released the Localism *NOI*, received comment, and come to conclusions on the state of local broadcasting. The Commission may well conclude that competition from SDARS will help goad local stations to provide programming more responsive to community needs. At the very least, a finding by the Localism Task Force that terrestrial broadcasters consistently fail to provide their local communities with coverage of local issues or fail to expose them to local talent would undermine the rationale for imposing restrictions on a potential outlet for local content.

It is clear that the NAB has not met the burden of supporting its bare bones claims about the quality of local commercial radio service in this country. Without the benefit of the Task Force’s analysis, based on the current state of the record, the NAB’s Petition cannot be granted, and the Commenters would therefore urge the Commission to permit SDARS to offer local content at least until the Task Force’s work is complete.

Commenters have tremendous difficulty envisioning a circumstance where it serves the public interest to foreclose the possibility of more localized content. To the contrary, increased concentration in the terrestrial radio market, and the resulting paucity of local programming on the airwaves, argues against closing any possible outlet for local programming. Nor do Commenters think it would serve the public interest to shield terrestrial radio broadcasters from competitive pressures. If terrestrial broadcasters fear listeners would rather pay to hear radio because pay radio offers compelling local content, then terrestrial broadcasters should offer better local programming. While Commenters stress that competition with SDARS *alone* cannot guarantee sufficient service to the local community, and thus does not relieve the Commission of the obligation to impose real public interest obligations on terrestrial broadcasters, competition from SDARS may very well help drive local radio licensees to back to their roots in the local community so that they can compete effectively. Certainly, competition from SDARS cannot make the terrestrial situation any worse.

Commenters also note that the NAB used the same arguments regarding the commercial viability of terrestrial radio to persuade Congress to raise the its multiple ownership limits. The Commission made similar findings in its *2002 Biennial Review Order*, justifying its decision to leave radio ownership limits intact on the grounds that industry consolidation protected the financial health of radio broadcasting and thus served the interests of localism. *In re 2002 Biennial Review of the Commission's Broadcast Ownership Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13733 (2003) (“*2002 Biennial Review*”). Even if SDARS threatened the financial health of terrestrial radio in 1995, there is no evidence to support that conclusion today. To the contrary, the dominance in terrestrial radio of large, vertically integrated corporations with public values of billions of dollars belies the argument that SDARS able

to offer local programming will drive terrestrial broadcasters to bankruptcy.

The NAB raises an important point, however, in demanding that SDARS licensees demonstrate that they have provided programming to underserved audiences nationally. The NAB is also correct that a grant of new authority to provide local content should include real public interest requirements. The Communications Act requires the Commission to ensure that licensees serve the public interest, a standard that incorporates within it a directive to foster local programming and coverage of matters of local importance.

That SDARS licensees received their licenses at auction does not in any way diminish their obligation to serve the public interest. 47 USC §309(j)(6)(B) directs the Commission to assure that the public interest is served regardless of how licenses are awarded. Like terrestrial broadcasters, SDARS licensees not only receive access to spectrum for a limited period of time, but must also execute a waiver of any property interest in the spectrum they are permitted to occupy.¹ Indeed, were it not for the Commission's *Subscription Video Order*, SDARS licensees would be broadcasters and subject to the same public interest requirements as the terrestrial radio service. *National Association of Broadcasters v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984) (rejecting FCC attempt to exempt DBS from broadcast public interest requirements under pre-*Subscription Video Order* definition of broadcasting) and *National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988) (upholding *Subscription Video Order*). Furthermore, because the promise to serve underserved communities was integral to the Commission's 1997 finding that authorizing SDARS

¹ 47 USC §304 provides that "No station license shall be granted by the Commission until the applicant therefor shall have waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."

would serve the public interest, any failure of SDARS licensees to demonstrate meaningful compliance with this condition would be a serious matter. Whether or not the Commission holds the NAB *Petition* in abeyance, it should consider how to ensure that SDARS licensees to fulfill their obligations to the public interest.

Finally, if the Commission does not hold the *Petition* in abeyance, and instead addresses the substance of the *Petition*, the Commission must accompany any decision granting the *Petition* in whole or in part with action setting forth new public interest requirements to ensure that terrestrial radio broadcasters genuinely serve their communities of license. It would be unconscionable for the Commission to protect terrestrial commercial radio broadcasters in the name of localism, while turning a blind eye to the continued failure of the majority of terrestrial radio broadcasters to serve their local communities.

The Commission should also prohibit the use of deceptive practices designed to make imported content appear locally originated, and prohibit group owners from imposing mandatory play lists. Of particular importance, coverage of local news provided from outside of the community must be identified as not being of local origin.² A local emergency such as a hurricane or a toxic waste spill cannot be covered from thousands of miles away by purportedly “local” radio personalities reading updates from Weather.com or wire services. Local conditions in such situations are far too fluid to rely on second and third hand reports, with attendant delays and inaccuracies.

COMMENTERS

Common Cause is a non-partisan non-profit dedicated to holding power accountable and encouraging citizen participation in democracy. Common Cause has nearly 300,000 members and supporters

²For example, a newscast might begin with the following: “This is the Corpus Christi report, coming from the Clear Channel news bureau in Galveston.”

throughout the country, and state organizations in 38 states.

The National Federation of Community Broadcasters is a twenty-nine year old grassroots organization which was established by and continues to be supported by member stations, comprising large and small, rural and urban broadcasters distinguished by their commitment to local programming, community participation and support. The Federation's nearly 250 members come from across the United States, from Alaska to Florida; from every major market to the smallest Native American reservation. While urban member stations provide alternative programming to communities that include New York, Minneapolis, San Francisco and other major markets, rural members are often the sole source of local and national daily news and information in their communities. This membership reflects the true diversity of the American population, with 41% serving rural communities, and 46% that are minority radio services.

The Office of Communication of the United Church of Christ, Inc. is a non-profit corporation advocating for the public interest in media and in particular, for those historically excluded from the media, especially women and people of color.. The United Church of Christ has 1.4 million members and nearly 6,000 congregations. It has congregations in every state and in Puerto Rico.

The Center for Digital Democracy is a nonprofit public interest organization committed to preserving the openness and diversity of the Internet in the broadband era, and to realizing the full potential of digital communications through the development and encouragement of noncommercial, public interest content and services.

Free Press is a national nonpartisan organization working to increase informed public participation in crucial media policy debates, and to generate policies that will produce a more competitive and public interest-oriented media system with a strong nonprofit and noncommercial sector.

The New America Foundation is a nonpartisan, non-profit public policy institute based in Washington, D.C., which, through its Spectrum Policy Program, studies and advocates reforms to improve our nation's management of publicly-owned assets, particularly the electromagnetic spectrum.

ARGUMENT

I. AS A RESULT OF THE CONSOLIDATION PERMITTED BY THE 1996 ACT AND THE LACK OF MEANINGFUL PUBLIC INTEREST OBLIGATIONS, LOCAL COMMERCIAL RADIO HAS INCREASINGLY BECOME A NATIONAL RATHER THAN LOCAL MEDIUM, AND FAILS TO SERVE LOCAL AUDIENCES.

Much has changed since the Commission declared its intent to authorize the SDAR Service in 1995. *In re Establishment of Rules and Policies for the Digital Audio Radio Satellite Service*, 11 FCC Rcd 1 (1995) (“*SDARS NPRM*”). Of greatest significance here, in response to the concerns

expressed the NAB voiced in the SDARS docket and elsewhere regarding the continued viability of local terrestrial broadcasting, Congress lifted the ownership limits on local radio stations in the Telecommunications Act of 1996. As a result, massive consolidation has completely reshaped the industry. Far from being the industry of struggling locally oriented outlets portrayed by the NAB, commercial terrestrial broadcast radio has become dominated by a few vertically integrated corporations with publically traded shares valued in the billions of dollars.

This striking change undermines the NAB's arguments in two fundamental ways. First, consolidation and the lack of meaningful public interest obligations have acted to sever the connection between local radio licensees and their audiences. Second, given the size of these conglomerates, it is doubtful that competition from SDARS will drive them out of business. Moreover, even if the need to protect allegedly struggling local stations in 1995 was significant enough to justify prohibiting SDARS licensees from offering local content at that time, it no longer remains justified in 2005. The 1996 Communications Act, which contained numerous provisions to improve the profitability of radio by allowing massive ownership consolidation has more than met any need to stabilize the terrestrial radio industry.

Indeed, competition from SDARS may force commercial radio stations to return to their local roots. But the FCC cannot make rational judgements about the merits of this proposal until it receives the recommendations from the Localism Task Force on the current state of localism and recommendations on how to proceed. The FCC should therefore hold the *NAB Petition* in abeyance until the conclusion of the localism proceeding.

A. Consolidation In Terrestrial Broadcasting Has Undermined Localism

This consolidation has done more than ensure the profitability of these group owners. It has

proved a catastrophe for the principles of localism and accountability to the community which should form the bedrock of the terrestrial broadcasting service. As a consequence of consolidation, local and regional programming has been displaced by nationally distributed vertically integrated offerings.

Of critical importance to local communities has been the loss of local news and local programming surrounding events and issues of importance to local communities. Increasingly, what little news one finds on the radio dial comes from a single centralized source thousands of miles away. Radio personalities pretend to discuss local news, make commentary on local events, critique local night life and hot spots, all without ever setting foot within a thousand miles of the licensee.³ Regional news bureaus located in distant cities present local newscasts without having reporters located within hundreds of miles of the city they purport to cover. Thus, Clear Channel audiences in Toledo and Lima, Ohio receive newscasts produced in Columbus. And Corpus Christ residents heard news of a hurricane from a Clear Channel Bureau located at least a hundred miles inland. See, Deborah Potter, A Vast Wasteland, *American Journalism Review*, November, 2000; Marc Fisher, Blackout on the Dial, *American Journalism Review*, June, 1998.

Even when local radio newscasts are locally originated, their contribution to the diversity of ideas is minimized when, as is increasingly the case, they are outsourced to a single contractor serving many or most of the stations in a community:

³Suzanne C. Ryan, "Local Anchor Feels Our Pain From Afar," *Boston Globe*, January 15, 2004. See, e.g., Hearing Before the Senate Committee on Commerce, Science and Transportation, "Media Ownership: Radio," January 30, 2003 (Statement of Jenny Toomey, Executive Director, Future of Music Coalition). See also Anna Wilde Matthews, "From a Distance: A Giant Radio Chain Is Perfecting The Art of Seeming Local," *The Wall Street Journal*, A1, February 25, 2002 ("The Art of Seeming Local").

Many radio stations that offer periodic headline reports and that even promote themselves as "newsradio" rely completely on syndicated services such as the Metro Networks and Shadow Broadcasting Services, which use a single announcer to service eight or ten stations in a market. These syndicated services employ few if any reporters and do not bother to subscribe to the AP or other wire services. Instead, they merely cannibalize local newspapers and cable news channels.

Lawrence K. Grossman, *The Death of Radio Reporting*, Columbia Journalism Review, September/October 1998. *See also* Andrew Jay Schwartzman, "Viacom-CBS Merger: Media Competition And Consolidation in the New Millennium," 52 Fed. Comm. L.J. 513, 515-16 (2000).

National playlists have squeezed out local bands and homogenized music across the country. Indeed, a study by the Future of Music Coalition demonstrates the national and local homogenization of music in commercial terrestrial radio. Peter DiCola & Kristin Thomson, *Radio Deregulation: Has It Served Citizens and Musicians*, Future of Music Coalition (2002) ("FMC Study"). According to the study, playlists among commonly owned radio stations contained significant overlap. Even within a the same market, commonly owned stations having supposedly different formats had considerable overlap in their playlists. Nor did playlists vary significantly over time. The end product of such homogeneity is a terrestrial broadcast service virtually indistinguishable from a national satellite service.

Worse, there exists credible evidence that variations in play lists come from more sinister sources than local taste. Persistent concerns about the revival of payola remain unaddressed. Even where there is not a direct quid pro quo of payment of money in exchange for airplay, the consolidation of the industry has allowed media conglomerates to extract "payola in kind," *i.e.* to receive significant airplay, a music group must purchase a package deal that includes concert promotion and billboard advertising. Recently, in denying a motion for summary judgment and allowing the

anti-trust case to go to trial, a district court in Colorado made very detailed findings of fact regarding Clear Channel's ability to control play lists nationally to force music groups to enter into such package deals.⁴

Most disturbing has been the deceptions practiced by national group owners to make programming appear local while in fact distributing a national service. Radio conglomerates prepare detailed primers to help radio personalities pretend familiarity with locals they have never visited. References to time, date and location are stripped from guest interviews so that they can appear to be "live" when aired in distant locals. Listeners are urged to "call in" to pre-recorded shows.⁵

Indeed, as described by one Clear Channel executive, radio conglomerates are pursuing a dedicated strategy designed to transform terrestrial radio into a national service with modest local "flavor" added at the local licensee. In an interview with *The Wall Street Journal* in 2002, the chief executive of Clear Channel's radio unit compared operating local radio stations to McDonald's franchises. "You may in some parts of the country get pizza and in some parts of the country get chicken, but the Big Mac is the Big Mac."⁶

So centrally controlled has commercial terrestrial broadcasting become that it has threatened the most basic of local functions that terrestrial broadcasters perform— real time notification of the public of emergency information critical to public safety. The well-documented experience of the

⁴*Nobody In Particular Presents, Inc. v. Clear Channel Communications, Inc.*, 311 F. Supp.2d 1048 (D. Col. 2004). On June 2, 2004, Clear Channel and Nobody In Particular Presents entered into a settlement under which Clear Channel admitted no violations of law.

⁵*See, e.g.*, Jeff Leeds, "Clear Channel Communications Clearly a Radio Giant: Deregulation Brings Rapid Expansion; Critics Air Concerns," *The San Louis Obispo Tribune*, D1, February 28, 2002.

⁶"The Art of Seeming Local," A1.

people of Minot, North Dakota is now so notorious that it need not be reiterated here in any detail. It is enough to observe that, despite the NAB's claims that terrestrial radio remains a critical lynchpin in local health, safety and security, consolidation and centralization has dangerously undermined this role.

This transformation did not take place overnight, nor did it go unnoticed. Congress has held numerous hearings on consolidation in radio and the disappearance of localism. *See, e.g., Broadcasting and the Public Interest: Hearing Before the Senate Committee on Commerce, Science and Transportation*, 108th Cong., 1st Sess., (2003); *Media Ownership Rules and FCC Reauthorization: Hearing Before the Senate Committee on Commerce, Science and Transportation*, 108th Cong., 1st Sess. (2003); *State of Competition: Hearing before the Senate Committee on Commerce, Science and Transportation*, 108th Cong., 1st Sess. (2003); *Media Consolidation: Hearing Before the Senate Committee on Commerce, Science and Transportation*, 107th Cong., 1st Sess. (2001); *Telecommunications Mergers: Hearing on the Telecommunications Merger Act of 2000 Before the House Subcomm. on Telecommunications Trade & Consumer Protection*, 106th Cong., 2d Sess. (2001). In 2002, a diverse coalition of unions and trade organizations – ranging from the Recording Industry Association of America to the National Federation of Community Broadcasters – send a letter to the FCC requesting that the FCC to investigate the rise of payola-like practices and the increases in centralized decision making regarding content by national group owners. “Joint Statement of Current Radio Issues,” May 24, 2002⁷. In the fall of 2002, the Future of Music Coalition released a study documenting massive listener dissatisfaction with terrestrial radio. FMC Study at

⁷Available at <http://www.futureofmusic.org/images/radioissuesstatement.pdf>. An update restating many of these issues was sent to the FCC in May 2003.

79-100.

In 2003, legislation was introduced in both the House and the Senate to address the erosion of localism and the increasingly anticompetitive conduct of large group owners. “Competition in Radio and Concert Industries Act of 2003,” S. 221 (Cong. Daily S1668) (January 28, 2003); H.R. 1763 (Cong. Daily H3303) (April 10, 2003).

These warnings of an increasing disconnect between commercial terrestrial broadcasters and their local communities fell on deaf ears at the Commission until the Commission undertook its *2002 Biennial Review*. In more than 2 million comments, citizens from across the country documented the continuing decline of localism in broadcasting. *2002 Biennial Review Order*, Dissenting Statement of Commissioner Adelstein, 18 FCC Rcd at 13977.

As a consequence of the popular outcry engendered by the *2002 Biennial Review*, Chairman Powell announced in August 2003 that the Commission would form a special task force to investigate the question of whether terrestrial broadcasters (both radio and television) continued to serve local communities. As the Chairman explained:

During the [*2002 Biennial Review*] and in the months that followed ...we heard the voice of public concern about the media loud and clear. Localism is at the core of these concerns...and we are going to tackle it head on.

“FCC Chairman Launches ‘Localism In Broadcasting Initiative,’” FCC Press Release (August 20, 2003) (“Powell Localism Statement”).

The Chairman authorized the task force to “conduct studies to rigorously measure localism” and make recommendations to the Commission on how to foster and improve localism among terrestrial broadcasters. The Chairman also promised that, by September 2003, the Commission would issue a *Notice of Inquiry* on localism. Among other issues, the Chairman explicitly identified

voice tracking as a matter for the *NOI* and the task force.

Sadly, the Commission has proceeded far more slowly than expected. As of the date of this writing, the Localism *NOI* has yet to be released. The Localism Task Force has held only three hearings. Nevertheless, even at this early stage of the Commission's investigation, evidence continues to mount that terrestrial radio broadcasters do not provide satisfactory local service. At all three hearings, local audiences protested the homogenization of the airwaves and the continuing disconnect between commercial terrestrial radio broadcasters and their audiences.⁸

Were the NAB and commercial broadcasters genuinely interested in facilitating local terrestrial radio service, they would encourage the further development of noncommercial community-based radio. Despite the meager resources of these noncommercial stations compared with their commercial brethren, community broadcasters have consistently offered an array of local content directly addressing community concerns. For example, noncommercial community broadcasters have offered non-English programming in places where commercial broadcasters do not find it effective to offer a non-English format. Noncommercial community broadcasters in many communities continue to cover local issues, local candidates, local news, and encourage broader discussion within their communities of matters of civic importance.

Instead, commercial broadcasters have actively opposed the introduction of new community broadcast services. The NAB opposed introduction of the low power FM (LPFM) radio service – a service which the Chairman has explicitly identified as serving the interests of localism. Despite the completion of an extensive technical study mandated by Congress and designed by NAB prov-

⁸Archived audio recordings of these hearings are available at <http://www.fcc.gov/real-audio/publicforums.html>. The written testimony of these hearings is part of the record compiled by the Localism Task Force.

ing conclusively that expansion of the LPFM service will not create a risk of harmful interference to commercial broadcasters, the NAB continues to oppose all efforts to expand the service. The NAB also has a history of fighting any explicit public interest mandates that ensure that local broadcasters serve their communities. Indeed, it has opposed even the modest requirement that local broadcasters document their efforts to recruit a workforce that reflects the diversity of their local audience.

The Commission should therefore regard the NAB's claims that restrictions on SDARS are necessary to maintain service to local communities with great scepticism. Far from being the locally oriented, locally controlled trustee of a local license portrayed by the NAB, commercial broadcasters have become little more than competing national chains offering a dash of local flavor. Worse, commercial terrestrial broadcasters have pursued this strategy in a highly deceptive fashion, seeking to maintain a veneer of localism through technological tricks and outright lies to listeners. They have opposed the introduction of locally oriented community-based terrestrial radio, and vigorously opposed any effort to hold them accountable to their local communities.

B. The Commission Cannot Determine Whether To Grant The NAB Petition Until It Assesses The Current State of Localism and Receives the Task Force's Recommendations.

The NAB has made an extraordinary plea for protection. At its heart, the sole justification for granting commercial terrestrial broadcasters is the special role terrestrial broadcasters play in local communities. Because of the critical role free, over the air local radio plays in providing citizens with "suitable access to social, political, esthetic, moral, and other ideas and experiences," *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969), the NAB argues the Commission has a responsibility to preserve the financial health of commercial broadcasters for the benefit

of all Americans.

Commenters do not disagree with the basic principle that exposing citizens to news and diversity of views is a government purpose “of the highest order.” *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 191 (1997). But Commenters maintain that the record to date demonstrates a dismal failure on the part of commercial radio broadcasters to serve their local communities in the manner required by the First Amendment and the Communications Act of 1934. Whether this is true, and what to do about it, is precisely the reason the Commission formed a localism task force.

It would be arbitrary and capricious for the Commission to grant the NAB’s *Petition* without first determining whether the underlying basis of the *Petition* is true. Is it necessary to protect commercial terrestrial radio broadcasters from competition to preserve local service? The Commission cannot reasonably answer this question before the Localism Task Force completes its work, given the monumental changes that have taken place in the terrestrial radio industry since 1996.

As an initial matter, the Commission should not simply accept the word of the NAB that the terrestrial radio industry is struggling financially. For example, when Sumner Redstone, Viacom’s CEO was asked about rumors that Viacom would sell Infinity in the wake of the departure of its primary architect, Mel Karmazin, Mr. Redstone replied: “I would say our chances of selling Infinity are minimal . . . the margins are high, the cash flow’s great.”⁹ Clear Channel, the largest group owner, reported record earning of over two billion dollars in the first quarter of 2004 – with nearly \$833 million in revenue coming from its radio broadcast unit.¹⁰ Such expressions of optimism and

⁹“Viacom Says Unlikely To Sell Radio Unit,” Reuters, June 2, 2004.

¹⁰“Clear Channel Reports Record First Quarter 2004 Results,” Clear Channel Press Release (May 4, 2004).

such record earnings do not jibe with the image of an industry on the verge of economic collapse.

More importantly, the Commission needs to assess whether commercial terrestrial radio licensees continues to serve their local communities. If, as the record so far suggests, commercial terrestrial broadcasters are increasingly failing to serve local communities, then the Commission must consider what to do about this failure. Certainly the Commission should not rush to reward licensees that have failed to serve the interests of localism by protecting them from competition in the name of localism.

The Commission must wait not merely for the record the Localism Task Force will develop, but for the Task Force's final report and recommendations. The Task Force may well recommend that competition from SDARS will spur commercial radio licensees to provide genuinely local service, and that SDARS should therefore have the authority to offer local content.

Certainly it has become apparent the Commission's prediction in 1997 that competition from SDARS as a national service that offered no local content would spur commercial terrestrial broadcasters to offer more local content, *Establishment of Rules and Policies for the Digital Audio Radio Service*, 12 FCC Rcd 5754, 5767 (1997) (*SDARS R&O*), has not borne fruit. The Task Force may therefore conclude that if the Commission shields commercial terrestrial broadcasters from head-to-head competition on local issues, that localism will continue to suffer.

The Localism Task Force cannot make its report and recommendation, of course, until the Commission releases its long overdue Localism *NOI*. The Commission should therefore hold the *Petition* in abeyance until it has released the *NOI*, received comment, and considered the report and recommendation of the task force. While the NAB will no doubt complain that this penalizes them for the Commission's laggard conduct, any other action would be arbitrary and capricious.

II. IF THE COMMISSION DOES NOT HOLD THE *PETITION* IN ABEYANCE, IT SHOULD DENY THE *PETITION*.

If the Commission decides to proceed on the basis of the current record, it should deny the NAB *Petition*. As an initial matter, the Commission should hesitate before categorically prohibiting any source of new local programming. Outlets for local programming have becoming increasingly rare, especially commercial outlets capable of supporting a community of local content producers. To prohibit a potential source of local programming from ever providing such local programming should require a profoundly compelling need. The current record does not support such a finding.

In fact, the exact opposite appears to be the case. Terrestrial radio cannot compete with SDARS as a national service. SDARS provides too many choices for a homogenized terrestrial service, as the national group owners have discovered. Disgusted with the limited menu offered by the multinational conglomerates that make programming decisions based on content, thousands of listeners each month flock to *pay* radio over *free* radio.

To meet this competition, commercial terrestrial broadcasters will need to re-establish their links with local communities and rediscover their local roots. SDARS, by its very nature, can never match the local service terrestrial broadcasters can offer if terrestrial broadcasters *try*. But commercial broadcasters have little incentive to try. The NAB successfully prevented the emergence of a genuine competitor when it persuaded Congress to scale back the LPFM service. Competition between local commercial stations has all but vanished as a consequence of consolidation and rampant abuse of local marketing agreements (LMAs). Why compete on local programming when one can buy out local rivals, leaving only a few multinational conglomerates all equally interested in cutting costs and equally disinterested in serving the local community?

Commenters recognize that SDARS “local content” at the moment is primarily traffic and weather and is primarily limited to major markets. Commenters do not suffer from any illusion that SDARS wish to provide service to local communities in the same manner that terrestrial licensees serving as trustees for their communities should. SDARS will always be a national service. But competition from SDARS may prove the best means of driving commercial terrestrial radio back to their local communities. By contrast, preserving for terrestrial broadcasters a monopoly on traffic and weather – the only local content provided by many licensees receiving distant signals via voice tracking – guarantees that commercial terrestrial broadcasters will continue to provide the barest minimum of local service the Commission will permit.

III. IF THE COMMISSION DENIES THE *PETITION*, IT SHOULD CONSIDER APPROPRIATE PUBLIC INTEREST OBLIGATIONS FOR SDARS.

While the record does not support granting the NAB’s *Petition*, the *Petition* does raise two significant points. First, the NAB accuses SDARS licensees of failing to serve niche audiences and minority communities. Since the Commission found that SDARS would serve the public interest in significant part because SDARS licensees promised to serve traditionally underserved communities, this is a very serious charge. Second, the NAB correctly observes that SDARS licensees have no formal public interest obligations to serve local communities. The NAB argues that this lack of local public interest requirements should disqualify SDARS from providing local service. While Commenters agree that these matters deserve Commission attention, Commenters disagree with the NAB’s assertions that the Commission should prohibit SDARS from providing local content.

A. The Commission Should Investigate Whether SDARS licensees Provide Adequate Programming to Minority and Niche Communities. But Failure To Provide Adequate Service to Minority Communities Does Not Support a Prohibition on Local Content.

Because SDARS licensees can aggregate audiences nationally, they are in a unique position to provide high quality programming to communities that make up a minority of any particular geographic area – although Commenters wish to emphasize that the availability of such programming does not in any way relieve commercial terrestrial broadcasters from serving minority communities within their service areas. The Commission rightly found that such benefits justified creation of the SDARS service. *SDARS R&O*, 12 FCC Rcd at 5761-62. Accordingly, the Commission must take active steps to ensure that SDARS licensees make such programming available.

Commenters fully expect that SDARS licensees will respond in this docket with evidence of how they serve minority and niche communities. If the NAB's accusations that SDARS licensees do not offer sufficient programming for minority communities is proven, however, the solution does not lie with prohibiting local programming. If anything, local programming may allow SDARS licensees to target local minority communities that commercial terrestrial licensees fail to serve.

Instead, the Commission should address any failure by SDARS licensees to serve minority and niche communities directly. The NAB does not explain in any detail how prohibiting SDARS from providing local content will shift SDARS priority to minority programming. According to the technical explanation offered by the NAB in its *Petition*, the ability to provide local programming comes from improvements in technology specifically designed to enhance local content delivery, rather than from diverting capacity from minority programming. *Petition* at 2.

As an initial matter, the Commission should consider whether a reporting requirement would

assist the Commission in monitoring how well SDARS licensees serve minority and niche communities and whether such a reporting requirement would encourage SDARS licensees to offer more programming choices. If any problem persists, the Commission can consider other alternatives, such as a set aside of spectrum similar to that provided by DBS licensees pursuant to 47 USC §335.

Commenters stress that at this stage there is no evidence that SDARS licensees have failed to provide adequate service to minority communities, especially given the fledgling nature of the service and the existing capacity of the SDARS systems. Nevertheless, the lack of evidence to date does not relieve the Commission of its obligation to thoroughly investigate the issue. Furthermore, as the service matures and the capacity of satellite systems expand with improvements in technology, the Commission may need to revisit the question of what constitutes adequate public interest service. Commenters recommend that the Commission use this proceeding to remind SDARS licensees of their commitments, and urge SDARS licensees to continue to expand their service to minority communities.

B. The Commission Should Consider If More Explicit and Locally Oriented Public Interest Obligations Are Required.

The NAB raises a valid point that SDARS licensees have no obligations to serve local communities. Again, however, it is irrational to address this issue by prohibiting SDARS from offering local content. Instead, the Commission should consider whether SDARS licensees should have explicit public interest obligations oriented toward local service.

Commenters note that, until the Commission's unfortunate decision in its *Subscription Video* proceeding, all services offering video and audio programming were "broadcasting" within the meaning of Communications Act. *National Association of Broadcasters v. FCC*, 740 F.2d

1190, 1205 (D.C. Cir 1984). In 1987, as a matter of statutory interpretation, the Commission determined that subscription services were not “broadcasting” and were therefore exempt from the explicit public interest obligations imposed by the Communications Act on “broadcasters.” *Report and Order, Subscription Video*, 2 FCCRcd. 1001 (1987) *affirmed sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988).

Nevertheless, because SDARS licensees use Title III licenses, the Commission retains broad authority to ensure that these licensees serve “the public interest, convenience and necessity.” 47 USC §307(a). That SDARS licensees received their licenses as a consequence of auctions does not in any way diminish their requirement to serve the public interest, or diminish the Commission’s authority to ensure that the licensees fulfill the longstanding public interest policies of the Communications Act. 47 USC §309(j)(6)(B). The Commission has authority to impose any new public interest obligations that it may deem necessary, and licensees sign an explicit waiver of any claim “against the regulatory power of the United State because of previous use of the same.” 47 USC §304.

Commenters do not suggest that the current record provides an adequate basis for determining whether more explicit, locally oriented public interest obligations are feasible at this time. The technology and the service itself are still in a phase of rapid development. At the same time, however, the Commission should not be content to allow SDARS licensees to cherry-pick the most desirable local content – traffic and weather – if the technology allows them to provide more. The Commission should take this opportunity to invite SDARS licensees to explain how they intend to serve local communities as their capacity to provide local content expands, and place SDARS licensees on notice that the Commission expects licensees that offer local content to genuinely serve

those communities.

IV. IF THE COMMISSION GRANTS THE *PETITION*, THE COMMISSION MUST IMPOSE VERY SPECIFIC LOCAL OBLIGATIONS ON COMMERCIAL TERRESTRIAL BROADCASTERS.

Finally, if the Commission does grant the NAB's *Petition*, it must impose regulations on terrestrial licensees to maintain its local quality. In particular, the Commission should prohibit commercial terrestrial broadcasters from offering what amounts to little more than a nation service with the competitive advantage of a monopoly on local traffic and weather.

As an initial matter, the Commission should prohibit the use of voice tracking to import program streams from distant locals. At the very least, the Commission should require commercial terrestrial broadcasters to identify when programming comes from non-local sources. Voice tracked D.J.'s urge local listeners to "call in" to purportedly live shows. On air personalities claim to have visited local hot spots and engaged in local activities, when they are thousands of miles away and have never visited the geographic location of the licensee. So deceptive have these practices been that state attorneys generals have investigated, and in at least one case cited, national groups owners for violating consumer fraud statutes.

If the Commission grants the NAB's *Petition* in the name of localism, it must prohibit such deceptive practices. Listeners have the right to expect and receive genuine local content from local licensees. At the very least, the Commission should not allow local licensees to deceive listeners about the nature of the content, when the Commission has prohibited a potential source of genuine local content.

Similarly, the Commission should prohibit the use of national play lists. National play lists promote precisely the kind of national music service that the *Petition* argues is the unique province

of SDARS. If the Commission chooses to protect commercial terrestrial broadcasters on the basis of their service to local communities, the Commission must require commercial terrestrial broadcasters to play local music, or, at the least, require them to carefully tailor their music selections to local tastes.

Finally, the Commission should move expeditiously to promote community radio. The Chairman has already identified expanding the LPFM service as a priority of the Commission. *Powell Localism Statement*. The Commission should also make responding to the interference complaints of noncommercial community broadcasters a priority. Because noncommercial community broadcasters are often the primary source of local programming – particularly on event and issues of local importance – the Commission should make ensuring that everyone within the broadcasting range of community radio licensees can, in fact, receive a clear signal.

Finally, the Commission should consider ways in which more spectrum or higher power can be given to community broadcasters. If the Commission intends to allow commercial broadcasters to continue to abandon their local communities, the Commission must consider how to reallocate scarce radio spectrum to promote the purposes of the Communications Act. Increasing the ability of community broadcasters to serve their communities would serve this end.

These recommendations constitute a bare minimum necessary to retain at least some measure of local service in terrestrial broadcasting. It is difficult to say with precision what should be required, *since the Localism Task Force has not completed its work*. If the Commission insists on rushing ahead, however, then it will be required to act with brute force rather than precision. The record before the Commission in the 2002 Biennial Review and that gathered by the Localism Task Force to date clearly demonstrates that commercial terrestrial radio fails to address the needs of

local communities. If the Commission insists on granting the NAB *Petition* now, it must respond to the record it has now.

CONCLUSION

The NAB has asked the Commission to shut SDARS off as a potential source of local programming because of the danger that SDARS will drain enough listeners that local radio will wither and die. Before the Commission can grant such a purely anticompetitive request, with no justification beyond the fact that it makes SDARS a better competitor, the Commission needs to assure itself that commercial terrestrial radio delivers the promised local service. On the record before the Commission at present, the Commission would be better off allowing SDARS to offer local service – a niche increasingly abandoned by the media conglomerates that dominate commercial radio.

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CERTIFICATE OF SERVICE

I certify that the foregoing pleading was served by first class mail on the foregoing:

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